Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, RAYMOND L. KASICKI, AND HARRY KIJOWSKI,

Petitioners,

v.

MICHAEL H. URBACH, TAX COMMISSIONER, NEW YORK DEPARTMENT OF TAXATION AND FINANCE,

Respondent.

Petition for a Writ of Certiorari to the New York Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state tax should be treated as a user fee for purposes of the Commerce Clause where it is imposed only on those who use certain state facilities or services and is measured by the extent of that use.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of New York, Appellate Division, First Department (App., *infra*, 1a-10a) is reported at 718 N.Y.S.2d 282, 279 A.D.2d 171. The opinion of the Supreme Court of New York, County of New York (App., *infra*, 11a-18a) is reported at 699 N.Y.S.2d 268, 182 Misc. 2d 576. The order of the New York Court of Appeals denying petitioners leave to appeal (App., *infra*, 19a-20a) is not reported.

JURISDICTION

The order of the New York Court of Appeals denying petitioners leave to appeal was entered on October 16, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the U.S. Constitution, U.S. Const. Art. I, § 8, cl. 3, provides: "The Congress shall have the Power * * * To regulate Commerce with foreign Nations, and among the several States, and the Indian Tribes."

The relevant provisions of New York Tax Law, Article 21-A, and Article 13-A, § 301-h, are set out in the appendix to this petition at 21a-24a.

STATEMENT

This case presents a question of considerable importance regarding the proper application of the Commerce Clause: how to determine whether a state levy on participants in interstate commerce is a user fee or a general revenue tax. That distinction has great practical significance. Under this Court's

precedents, a user fee will be upheld only if there is "a showing, based on factual evidence in the record, that 'the fees charged do not appear to be manifestly disproportionate to the services rendered [to the taxpayer].'" *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 622 n.12 (1981) (citation omitted). General revenue taxes, in contrast, are subject to a much more forgiving standard. States may defend general revenue levies by showing little more than that the amount of tax imposed varies in proportion to the level of the taxpayer's in-state activities; taxing authorities need not demonstrate that the tax collected actually approximates the cost or value of the services provided to the taxpayer by the State. See, *e.g.*, *id.* at 622-623.

Here, the state court set out an insupportable and dangerous test to distinguish user fees from general revenue taxes. In holding that New York State's levy on the use of motor fuel is not a user fee, the court found dispositive the *label* attached to the tax by the state legislature, while wholly disregarding the *actual character* of the fee. That embrace of formalism and rejection of economic reality cannot be squared with this Court's precedents. Not surprisingly, the ruling also frustrates significant Commerce Clause policies, encourages manipulation and evasion of Commerce Clause requirements, and inevitably will cause great confusion in a much-litigated area. Review by this Court therefore is warranted.

1. The State of New York imposes a toll on motor carriers that travel on the Governor Thomas E. Dewey Thruway (the "New York Thruway" or "Thruway"). Thruway toll revenue collected from a typical five-axle truck amounts to approximately seven cents per mile traveled. See R. 24. These tolls, along with related revenue from concessionaires, pay for all services provided by New York to commercial vehicles operating on the Thruway. On the current state of the record, it must be accepted, as alleged in the complaint, that "[t]he entire cost of operating the New York Thruway, including all

administrative, maintenance and capital costs, as well as the cost of traffic control, safety, and all policing functions, are paid for through tolls, restaurant and service station concessions, and similar earnings." R. 23. See App., *infra,* 12a & n.2.

This case concerns the validity of a second New York levy, the Fuel Use Tax ("FUT"), which the State also imposes on commercial motor carriers traversing New York roads, including the Thruway. Article 21-A, § 523(a) of the New York Tax Law imposes "a tax on fuel use for the privilege of operating any qualified motor vehicle upon the highways of this state." The "qualified motor vehicles" subject to the levy are commercial vehicles that have three or more axles or exceed 26,000 pounds. *Id*, § 521(b)(1)(i), (ii). The FUT is collected on fuel consumed by these trucks while driving on the public highways of New York State, and thus effectively is incurred by using New York roads and measured by the extent of such use. Motor carriers that purchase fuel in New York are entitled to a credit or refund for the tax paid on such fuel at the pump when the fuel is consumed outside the State; conversely, carriers that purchase fuel outside New York but use it in the State are required to pay the FUT on the portion of that fuel used in New York. *Id.*, § 526(a), (b). Revenues collected under this provision of the statute are placed in New York's "dedicated highway and bridge trust fund." *Id*, §§ 515, 528(a). See App., *infra*, 3a. A related levy on the use of fuel is collected on identical terms pursuant to Article 13-A, § 301-h, of New York's Tax Law. This portion of the levy is placed in the State's general fund. *Id*, § 301-h(d). In total, the tax collected under these two provisions (collectively referred to here as the FUT) amounts to approximately 30 cents per gallon of fuel consumed, or five cents per mile, for a large commercial vehicle. R. 23.[1]

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[1] Under the scheme established by the Intermodal Surface Transportation Efficiency Act of 1991, 49 U.S.C. § 31705, motor

2. Petitioners here – the Owner-Operator Independent Drivers Association ("OOIDA"), a business association of persons and entities who own and operate motor carrier equipment,[2] and two individual owner-operators who respectively reside in Ohio and New York – brought this action in New York state court to challenge the constitutionality of the FUT as the levy applies to travel on the New York Thruway. Petitioners maintain that the FUT is a "user fee" within the meaning of the Commerce Clause and that, under a long line of this Court's precedent, such a fee is invalid unless record evidence supports the conclusion that the amount collected reasonably approximates the cost or value of the services provided by the taxing State to the fee payer. Petitioners have contended that the FUT cannot satisfy this test because, so far as travel on the Thruway is concerned, the *entire* cost of such services is realized by the State from tolls and related revenues. As a consequence, petitioners' position is that application of the FUT to Thruway miles – a use for which they have already fully paid – is manifestly excessive under the governing

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carriers report and pay all of their state fuel tax obligations quarterly to the State or Canadian Province in which they are registered (their "Base State"), rather than making multiple payments to the different States or Provinces in which they operate (the "Taxing States"). The Base State, to which the payer's total fuel-tax payment is made, then transfers the appropriate funds to the State in which the fuel-tax liability was incurred. As a Taxing State, New York receives and maintains fuel tax returns only for taxpayers for whom New York is the Base State. Taxpayers based in other States file their fuel tax returns, which reflect their New York fuel-tax liabilities, in their individual Base States. R. 20.

[2] Owner-operators comprise one of the primary sectors of the interstate motor carrier industry, accounting for an estimated forty percent of all intercity truck traffic in the United States. At the time this suit was filed, OOIDA had over 40,000 members residing in all fifty States and Canada. R. 18.

Commerce Clause test. Petitioners did not contest the constitutionality of the FUT as it applied to travel on other New York roads.

The state trial court rejected this argument, dismissing the case for failure to state a claim upon which relief could be granted. App., *infra*, 11a-18a. The court was of the view that taxpayers cannot make out a Commerce Clause claim unless there has been "differential treatment of intrastate and interstate commercial interests." *Id.* at 15a. Alternatively, the court held that the FUT should be upheld because, "[e]ven assuming plaintiffs' claim is true – *i.e.*, that the full cost of the Thruway is covered by the tolls imposed –" the State need show only that the measure of the tax is in some sense related to the extent of the taxpayers' in-state activities. *Id.* at 17a.

The Appellate Division of the New York Supreme Court affirmed, although on somewhat different grounds. App., *infra*, 1a-10a. After noting that the FUT did not in terms discriminate against interstate commerce (*id.* at 4a-6a), the court recognized that "any user fee that fails to fairly reflect the value of the service provided by the State that imposes it is, *ipso facto*, an undue burden on interstate commerce." *Id.* at 7a. The court found that rule inapplicable here, however, because it held that the FUT is *not* a user fee.

In the court's view, "[c]ases construing taxes imposed for the 'privilege' of conducting activities within the levying State normally involve general revenue assessments, not user fees"; because the FUT is labeled a tax on the "privilege" of using New York's roads, the court concluded that it "is not, by the plain import of its language, a user fee." App., *infra*, 7a. The court added that the FUT also should not be characterized as a user fee because the court was unconvinced that it was "'designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services'" (*id.* at 7a-8a (citation omitted))

– even though the court acknowledged that "the calculation of the fuel use tax [is] based upon milage amassed on the State's highways" and that a portion of the FUT revenue is placed in New York's highway and bridge trust fund. *Id.* at 8a. The court therefore judged the FUT according to the test applicable to general revenue taxes and upheld it under that standard. *Id.* at 8a-10a.

The New York Court of Appeals denied petitioners leave to appeal. App., *infra*, 19a-20a.

REASONS FOR GRANTING THE PETITION

The holding below, which greatly expands state power to impose burdensome taxes and fees on instrumentalities of interstate commerce, threatens to cause considerable mischief and confusion in an area of law that this Court has itself described as a "'quagmire.'" *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 280 (1987) (citation omitted). This Court has drawn a sharp distinction between the Commerce Clause treatment accorded general revenue taxes, on the one hand, and user fees, on the other. But the court below subverted that rule by holding that the New York Fuel Use Tax should *not* be treated as a user fee for Commerce Clause purposes – even though the FUT is imposed on a narrow category of payers who become liable for the fee by engaging in activities that make use of state facilities, and even though the amount of the fee is measured by the extent to which the payers use those facilities. This decision has provided a template for other state courts and taxing authorities that seek to evade Commerce Clause restrictions on the imposition of targeted fees for the use of facilities of interstate commerce. Because this holding involves recurring issues of great practical importance, imposes significant burdens on interstate commerce, and plainly departs from this Court's precedents, further review is warranted.

A. The FUT Cannot Satisfy This Court's Commerce Clause Test For User Fees

This case involves application of the fourth prong of the Commerce Clause test articulated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), which provides that a "state tax on interstate commerce" will be invalidated unless the tax "is fairly related to the services provided [to the taxpayer] by the State." 430 U.S. at 279.[3] It is common ground between the parties here that, where *general revenue taxes* are concerned, this "fair relationship" requirement is satisfied so long as "the measure of the tax [is] reasonably related to the extent of the [taxpayer's] contact" with the taxing State. *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 626 (1981) (emphasis omitted). As to such taxes, the Court has held that "[t]he fair relation prong of *Complete Auto* requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 199 (1995). Instead, so long as "the measure of a [general revenue] tax is reasonably related to the taxpayer's activities or presence in the State" – so long, that is, that the amount due varies according to the extent of the taxpayer's in-state activities – the taxpayer "will realize, in proper proportion to the taxes it pays, '[t]he only benefit to which the taxpayer is constitutionally entitled ... [:] that derived from his enjoyment of the privileges of living in

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[3] In addition to this requirement, a state tax is inconsistent with Commerce Clause requirements unless it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [and] [3] does not discriminate against interstate commerce." *Complete Auto Transit*, 430 U.S. at 279. See also, *e.g.*, *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 310-313 (1992). The application of these prongs of the *Complete Auto* test is not at issue here.

an organized society, established and safeguarded by the devotion of taxes to public purposes.'" *Commonwealth Edison*, 453 U.S. at 628-629 (quoting *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 522 (1937) (ellipses and bracketed material added by the Court)).

The Court, however, has applied a very different Commerce Clause test to *user fees*. As the Court explained in *Commonwealth Edison*:

> "Such imposition[s], although termed a tax, *cannot be tested by the standards which generally determine the validity of taxes*." *Interstate Transit, Inc.* v. *Lindsey*, 283 U.S. 183, 190 (1931). Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, *we have required a showing, based on factual evidence in the record, that "the fees charged do not appear to be manifestly disproportionate to the services rendered. ..."* *Clark* v. *Paul Gray, Inc.*, 306 U.S. [583], 599 [(1939)]. See *id.*, at 598-600; *Ingels* v. *Morf*, 300 U.S. [290], 296-297 [(1937)].
>
> One commentator has suggested that these "user" charges "are not true revenue measures and ... the considerations applicable to ordinary tax measures do not apply." P. Hartman, *State Taxation of Interstate Commerce* 20, n. 72 (1953). Instead, "user" fees "partak[e] ... of the nature of a rent charged by the State, based upon its proprietary interest in its public property, [rather] than of a tax, as that term is thought of in a technical sense." *Id.* at 122.

453 U.S. at 622 n.12 (ellipses and bracketed material added by the Court; emphasis added).[4] In choosing to apply the standard

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[4] This remains the law; the current version of Prof. Hartman's treatise makes the same point in almost precisely the same language.

governing general revenue taxes to the levy before it, *Commonwealth Edison* therefore "put to one side those cases in which the Court reviewed challenges to 'user' fees or 'taxes' that were designed and defended as a specific charge imposed by the State for use of state-owned facilities." 453 U.S. at 621 (citing *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972); *Clark* v. *Paul Gray, Inc.*, *supra*; *Ingels* v. *Morf*, *supra*).

Applying this user-fee test, the Court repeatedly has invalidated state fees where the record supported the conclusion that the amounts collected substantially exceeded the cost of services provided to the payers. See, *e.g.*, *Ingels*, 300 U.S. at 296-297; *Interstate Transit*, 283 U.S. at 190. Conversely, the Court has upheld such fees only after examining the record and determining that the fees were not "excessive in relation to cost incurred by the taxing authorities." *Evansville-Vanderburgh Airport Authority Dist.*, 405 U.S. at 719-720. See *Clark*, 306 U.S. at 599.

The FUT plainly cannot satisfy this Commerce Clause user fee test, and the court below did not suggest that it could. It is undisputed that there is *no* factual evidence in the record indicating that, so far as the FUT is concerned, there is *any*

See P. Hartman, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 670 (1981 & Supp. 1999). Prof. Walter Hellerstein, perhaps the nation's leading scholar of state and local taxation, recently made an identical argument in an *amicus* brief filed in this Court: "in the Commerce Clause context, the only distinction the Court has ever drawn between a tax and a fee is a distinction between general revenue measures, on the one hand, and user fees, on the other, and then only to point out that user fees are subjected to a *greater* degree of constitutional scrutiny than are general revenue measures." No. 98-1282, *Franks & Son, Inc.* v. *Washington*, Br. of *amicus* ATA in support of petitioner, at 9 n.5 (emphasis in original).

relationship between the amount of tax paid and the services provided to the payers, or *any* evidence from which it could be concluded that the FUT "purport[s] to approximate fairly the cost or value of the use of [the New York Thruway]." *American Trucking Ass'ns*, 483 U.S. at 290. To the contrary, on the current state of the record, it must be accepted that the FUT imposes costs on petitioners for use of the Thruway that are *manifestly greater* than the benefits provided by the State. The only information on the point is contained in the complaint, which alleges that "[t]he *entire* cost of operating the New York Thruway, including all administrative, maintenance and capital costs, *as well as the cost of traffic control, safety, and all policing functions*, are paid for through tolls, restaurant and service station concessions, and similar earnings." R. 23 (emphasis added).

B. The FUT Must Be Treated As A User Fee For Commerce Clause Purposes

Against this background, the dispositive question in this case is whether the FUT must be characterized for Commerce Clause purposes as a user fee rather than a general revenue tax.[5] The court below held the levy to be a general revenue tax, for two reasons: (1) the FUT "is not, by the plain import of its language, a user fee" because it ostensibly falls on the "privilege" of using New York's highways, and "[c]ases construing taxes imposed for the 'privilege' of conducting activities within the levying State normally involve revenue assessments, not user fees" (App., *infra*, 7a); and (2) the FUT is not "'designed and defended as a specific charge imposed by

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[5] The appropriate characterization of a state levy for purposes of the U.S. Constitution is, of course, a matter of federal law. See, *e.g.*, *United States* v. *Mississippi Tax Comm'n*, 421 U.S. 599, 609 (1975) (in addressing where legal incidence of a state tax falls when determining entitlement to constitutional tax immunity, "the duty rests on this Court to decide for itself").

the state for the use of state-owned or state-provided transportation or other facilities and services.'" *Id.* at 7a-8a (citation omitted). In several respects, however, this analysis misstates the test for identifying a user fee, is flatly inconsistent with this Court's precedents, and substantially undermines important Commerce Clause policies.

First, that the state legislature denominated the FUT a "privilege" tax rather than a user fee cannot control the analysis. The Court has held repeatedly, under both the Commerce Clause and related constitutional provisions, that it is the "practical effect" and "economic reality" of a levy, rather than its label, that must govern. *Complete Auto*, 430 U.S. at 278, 279. "'[W]e must regard things rather than names,'" which means that "[t]he crucial question" in this context is how a levy functions "in operation as well as nomenclature." *United States* v. *U.S. Shoe Corp.*, 523 U.S. 360, 367 (1998) (quoting *Pace* v. *Burgess*, 92 U.S. 372, 376 (1876)) (construing the Export Clause). Indeed, in *Complete Auto* itself – a decision relied upon by the court below for its analysis on this point (see App., *infra*, 7a) – this Court observed that "[t]here is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect." 430 U.S. at 288.

It therefore is no surprise that a number of levies described by the Court as user fees for purposes of Commerce Clause analysis nevertheless were labeled "privilege taxes" in the state statutory text. See, *e.g.*, *Clark*, 306 U.S. at 586; *Interstate Transit*, 283 U.S. at 186. After all, if simply denominating a levy as one that falls on the "privilege" of engaging in particular activities were enough to shield it from the searching Commerce Clause review appropriate for user fees, a legislature's use of statutory boilerplate would determine the constitutionality of the levy, the Commerce Clause rule would

"stand[] only as a trap for the unwary draftsman" (*Complete Auto*, 430 U.S. at 279), and the Clause would afford almost wholly illusory protection. The New York court's embrace of such an approach cannot be reconciled with this Court's holdings.

Second, the FUT plainly is, in reality, a user fee that constitutes "a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services." *Commonwealth Edison*, 453 U.S. at 621. The FUT is imposed on a small group of payers – commercial motor carriers, who almost invariably are engaged in interstate commerce – and tax liability is incurred only because the payers conduct particular activities involving use of state highways. The amount due, moreover, varies directly with the *extent* of the use of state facilities; the more miles driven on New York roads, the more the carrier will pay in fees. Indeed, motor carriers receive a refund for taxes paid on fuel that is purchased but not consumed in New York.

The FUT thus would appear to be the very archetype of a user fee. Other levies treated by the Court as user fees have shared the same essential characteristics: they were imposed exclusively on a limited group of participants in interstate commerce by virtue of the payers' use of state roads or other facilities. See, *e.g.*, *Evansville-Vanderburgh Airport Authority Dist.*, 405 U.S. at 709-710 (fee on enplaning air passengers); *Clark*, 306 U.S. at 586-587 (fee on vehicles driven into State for purposes of sale); *Ingels*, 300 U.S. at 292 (fee for transporting vehicles into State for purposes of sale); *Interstate Transit*, 283 U.S. at 185 (fee on busses graduated according to seating capacity).[6]

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[6] The statutory language at issue here explicitly declares that the tax is imposed for the use of the State's highways: "Fuel use tax. (a) Imposition. There is hereby imposed on and after January first,

The conclusion that the FUT must be treated as a user fee is, moreover, compelled by the constitutional policy that underlies the user fee doctrine. Generally applicable taxes are appropriately subject to limited Commerce Clause review, "in spite of any adverse effects [they may have] on interstate commerce, * * * because '[t]he existence of major in-state interests adversely affected [by the taxes] ... is a powerful safeguard against legislative abuse.'" *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 200 (1994) (quoting *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981)) (second ellipses added by the Court). That safeguard, however, is of little value when the levy is a user fee that involves a limited number of payers – and, in particular, when the fee is one that falls almost exclusively on entities engaged in interstate commerce. In such cases, "a State's political processes can no longer be relied upon to prevent legislative abuse." *West Lynn Creamery*, 512 U.S. at 200.

Because such fees offer taxing authorities an easy mechanism by which to transfer the State's tax burden to out-of-state taxpayers and commercial interests, the Commerce Clause requires that they not be "excessive in comparison with the governmental benefit conferred." *Evansville-Vanderburgh Airport Auth. Dist.*, 405 U.S. at 717. This policy applies with full force to the FUT, which falls principally on (and demonstrably extracts excessive revenues from) motor carriers

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nineteen hundred ninety-six a tax on fuel use for the privilege of operating any qualified motor vehicle upon the public highways of this state." N.Y. Tax Law Art. 21-A, § 523. It is difficult to believe that a more explicit description of a user fee could be required under this Court's formulation. In any event, it cannot be the case that a levy escapes treatment as a user fee because the statutory text does not in terms declare that it is imposed as a charge for the use of state facilities. For reasons already stated, statutory boilerplate that has no operative effect cannot determine the constitutional status of a fee.

and truck drivers, a narrow category of taxpayers who engage predominantly in interstate commercial activities.

Viewing the FUT as a user fee for Commerce Clause purposes also draws support from decisions involving closely analogous constitutional and statutory provisions. In *U.S. Shoe*, for example, the Court held that the principal characteristic distinguishing a "user fee" from a "tax" under the Export Clause is that user fees "correlate reliably with the * * * services used or usable by the [payer]" and "fairly match the [payer's] use of [government] services and facilities." 523 U.S. at 369, 370. That is true of the FUT, the amount of which is precisely calibrated according to the payer's use of New York roads. Conversely, as then-Judge Breyer wrote in explaining how "to distinguish 'taxes' from regulatory 'fees' in a variety of statutory contexts," "[t]he classic 'tax' is imposed by a legislature upon many, or all, citizens." *San Juan Cellular Tel. Co.* v. *Public Service Comm'n*, 967 F.2d 683, 685 (1st Cir. 1992). That is *not* true of the FUT, which is targeted to fall only upon motor carriers that use New York highways. And like many user fees, revenues from the FUT are placed in a segregated fund and dedicated in significant part to specified uses that are related to the activities giving rise to fee liability. See, *e.g.*, *Massachusetts* v. *United States*, 435 U.S. 444 (1978) (intergovernmental tax immunity doctrine); *Edye* v. *Robertson* (*Head Money Cases*), 112 U.S. 580, 595-596 (1884) (Uniformity Clause); *San Juan Cellular*, 967 F.2d at 685-687. The analysis used below is in considerable tension with these decisions.

Third, other indicia confirm the common sense view that the FUT is a user fee. The Federal Highway Administration of the U.S. Department of Transportation commonly treats all levies on motor vehicles and motor fuel as "user" fees and taxes. See, *e.g.*, U.S. Dept. of Transportation, *1999 Status of the Nation's Highways, Bridges and Transit: Conditions and Performance,*

Report to Congress, Chapter 6, at 6-4 (characterizing "Motor-Fuel Taxes" as "User Charges"). Courts in other States have agreed that highway taxes are a form of user fee. See, *e.g.*, *In re Oklahoma Capitol Improvement Auth.*, 958 P.2d 759, 764-765 (Okla. 1998) (describing Oklahoma highway taxes). Indeed, it is revealing that, prior to the filing of this lawsuit, the New York courts had *themselves* regarded the FUT as a user fee: the New York Court of Appeals described all of the State's highway taxes as "user-derived taxes and fees." *Schulz* v. *State*, 639 N.E.2d 1140, 1143 (N.Y. 1994). These exactions included "*taxes and fees derived from use of [highway] facilities*: vehicle registration fees, *the motor fuel tax*, the petroleum and aviation fuel business tax and miscellaneous highway use taxes." *Id.* at 1142 (emphasis added). It is only when faced with a constitutional challenge to the FUT that the state courts had a convenient, and surprising, change of heart.

Litigation in Indiana illustrates the nature of the problem. Before the Indiana fuel use tax was challenged in a case identical to this one, the Indiana Tax Court, on two occasions, had described that levy as a user tax. See *Area Interstate Trucking, Inc.* v. *Indiana Dept. of Revenue*, 605 N.E.2d 272, 277 (Ind. Tax Ct. 1992), cert. denied, 510 U.S. 864 (1993) ("the purpose of the motor carrier fuel tax is simply to charge motor carriers for the use of the public roads in Indiana"); *Roehl Transport, Inc.* v. *Indiana Dept. of Revenue*, 653 N.E.2d 539, 564 (Ind. Tax. Ct. 1995) (applying to Indiana's fuel use tax the rule applicable to user fees set forth in *Evansville-Vanderburgh*). Like the courts in New York, however, the Indiana Tax Court had a sudden change of heart when faced with having to treat the Indiana fuel use tax as a user fee for Commerce Clause purposes. See *Anderson* v. *Indiana Dept. of State Revenue*, 758 N.E.2d 597, 601 n.3 (Ind. Tax 2001) (appeal pending).

C. The Issue Presented Here Is An Important And Recurring One

The issue presented here is a recurring one of enormous practical importance that warrants this Court's attention. Motor fuel taxes like the FUT are imposed by all but one of the States. These levies have generated considerable litigation. At the time the present suit was initiated against the State of New York, three substantially identical cases were filed against state taxing authorities in Illinois, Indiana, and Ohio. Courts in each of these jurisdictions, following New York's lead, held that their fuel use taxes are not user fees. See *Owner-Operator Independent Drivers Ass'n* v. *Bower*, 757 N.E.2d 627, 633-634 (Ill. App. Ct. 2001) (appeal pending); *Anderson*, 758 N.E.2d at 601 n.3 (citing to the Illinois Appellate Court decision, which in turn relied on the New York decision at issue here); *Owner-Operator Independent Drivers Ass'n* v. *Tracy*, No. 99CVH02-1412, slip op. 11 (Ohio C.P. Franklin County, June 7, 2001) (Magistrate's decision on appeal to trial court). Absent intervention by this Court, the momentum generated by these decisions – and the reluctance of state courts to recognize constitutional limits on state taxing authority – inevitably will discourage future attempts to raise the substantial Commerce Clause issue presented here.

This is no small matter. Levies like the FUT are used to raise significant amounts of revenue – and impose correspondingly large burdens on interstate motor carriers. In excess of $60 million annually is at stake in this case alone. Nationwide, it is likely that taxes imposed by States on the use of motor fuel by commercial vehicles on toll roads amount to hundreds of millions of additional dollars. These amounts are large in absolute terms. And they have special importance for independent owner-operators like the members of OOIDA and the individual petitioners here, who pay a substantial portion of their revenue in motor fuel fees. Owner-operators under lease

to motor carriers typically are responsible for paying the cost of operating their equipment, including the cost of fuel and fuel use taxes. The burden of paying such taxes falls particularly hard on owner-operators, whose annual incomes are often in the range of $35,000-$40,000. At the same time, owner-operators comprise one of the primary sectors of the interstate motor carrier industry, accounting for an estimated 40% of intercity truck traffic in the United States; nationwide, there are hundreds of thousands of owner-operators. In this setting, if there are doubts about the constitutional status of levies like the FUT, it would be best for the Court to resolve them now, before States become subject to additional refund liability and motor carriers and owner-operators are subjected to additional unwarranted burdens.

That is especially so because the issue presented here has implications that go far beyond fees imposed on the use of motor fuel. The question whether a levy is a user fee may arise in a wide range of Commerce Clause contexts and may have relevance in other constitutional settings as well. Cf. *United States* v. *Sperry Corp.*, 493 U.S. 52, 60-61 (1989). Yet the approach taken by the decision below disregards the relevant holdings of this Court and threatens to wholly sap the Commerce Clause user fee doctrine of its vitality, offering state legislatures a rhetorical formula that always can be used to circumvent the constitutional rule. If the close scrutiny long required of user fees is to be cast aside, that step should be taken only after careful consideration of the issue by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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